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CASENOTES

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In a hypothetical scenario, the President of the Southern Republic of the Pacific calls a summit of local economists and manufacturers to discuss increasing exports to the United States. A lobbyist for Pacific Textiles Exports, Limited, describes his company's export problems. Although Pacific Textiles produces quality clothing at lower than U.S. market prices, their representative claims that Southern has been unable to enter the U.S. market because shipping, administrative, and other overhead costs have pushed its prices above U.S. market prices. To establish a substantial market share in the United States, the lobbyist requests some form of direct or indirect government subsidy. The President guarantees him government assistance.

Immediately to the north, the Ministry for Textile Production of the Northern People's Republic of the Pacific issues its annual People's Directive Number 3457, specifying the materials to be allocated to textile factories and the prices at which the textiles will be sold. The Directive's prices are significantly lower than market prices for similar textiles manufactured in the United States. While in the past the People's Republic has not traded with the United States, the soothing of cold war tensions has lessened trade barriers, opening the U.S. market for the first time.

In the United States, the media reports these concurrent, but independent, events in the two Pacific basin nations. Congress, the White House, and the Department of Commerce are flooded with mail. Textile workers fear unemployment. Farmers worry cotton sales will drop. Textile factory owners know they cannot match the price of Pacific basin goods. The cry for protectionism manifests itself in a call for countervailing duties against the foreign goods.

Under U.S. law, domestic manufacturers and producers may petition the International Trade Administration (ITA) of the Department of Commerce to levy countervailing duties (CVDs) against imported goods when foreign governments extend subsidies, bounties or grants to the manufacturers, producers, or exporters of the goods.[1] The ITA may levy a CVD to offset any price reduction and restore the import's price to market level.[2]

Although the ITA can easily detect and measure subsidies on imports from market economies, the ITA's task is complicated when dealing with imports from centrally-planned, nonmarket economies

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[1] *See* 3 J. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS § 6.01[1] (1984).
[2] *Id.*

(NMEs).[3] Due to an absence of market forces influencing prices, there is no easily ascertainable subsidy. In fact, a subsidy arguably does not exist at all because all supply and demand decisions are centrally made. In *Georgetown Steel Corp. v. United States*,[4] the United States Court of Appeals for the Federal Circuit concluded that countervailable subsidies could not be found in certain economic incentive programs conducted by the Soviet Union or the German Democratic Republic.

Georgetown Steel arose from petitions filed by several U.S. manufacturers seeking CVDs against two kinds of NME imports: carbon steel wire rods and potassium chloride (potash).[5] After a lengthy discussion on the timeliness of filing complaints with the Court of International Trade (CIT), the Federal Circuit remanded the carbon steel wire cases to the CIT with directions to dismiss for lack of jurisdiction.[6] The court addressed the potash cases on their merits.

At issue was whether potash imported to the United States from the Soviet Union (U.S.S.R.) and German Democratic Republic

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[3] An NME exists when a centralized mechanism or authority rather than supply and demand forces drive the pricing and allocation structure (*e.g.* a communist or purely socialist state). The ITA defines *nonmarket economy* as one that "operates on principles of nonmarket cost or pricing structures so that sales or offers for sale of merchandise in that country or to other countries do not reflect the market value of the merchandise." Potash from the U.S.S.R. and the G.D.R., 49 Fed. Reg. 23,428 (1984). In Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1314 (Fed. Cir. 1986), the Federal Circuit also adopted this definition.

[4] 801 F.2d 1308 (Fed. Cir. 1986).

[5] The CIT consolidated the cases. *Georgetown Steel*, 801 F.2d at 1310. *See also* Continental Steel Corp. v. United States, 614 F. Supp 548 (Ct. Int'l Trade 1985), *vacated sub nom.* Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

[6] *Georgetown Steel*, 801 F.2d at 1313. In November 1983 several U.S. steel companies filed CVD petitions with the ITA against Czechoslovakian and Polish carbon steel wire rod manufacturers. *Id.* at 1310. *See also infra* note 70 and accompanying text. Although the carbon steel wire claims came to the Federal Circuit as a consolidated case with the potash claims, the Federal Circuit dismissed the carbon steel wire claims on procedural grounds.

After reviewing the procedure for timely filing of a complaint with the CIT, the Federal Circuit remanded the steel rod cases to the CIT with directions to dismiss for lack of jurisdiction. *Georgetown Steel*, 801 F.2d at 1313. According to the statutory rules of the CIT, a party seeking review of an ITA determination must either (1) file a summons and a complaint simultaneously within 30 days of the determination or (2) file a summons within 30 days of the determination and a complaint within 30 days of the summons. *Id.* at 1311. Although Georgetown Steel, using the latter method of filing, mailed its complaint to the CIT within 30 days of its summons, the complaint was returned due to insufficient postage and was remailed after the 30 day deadline. *Id.*

Holding that the CIT did not have jurisdiction, the Federal Circuit strictly read CIT Rule 5(g) requiring "the proper postage [be] affixed" before a pleading is considered filed with the CIT. *Id.* at 1313. The court rejected an earlier CIT decision in Jernberg Forgings Co. v. United States, 7 Ct. Int'l Trade 62, *vacated on other grounds*, 8 Ct. Int'l Trade 245 (1984), which required only that the summons be mailed within 30 days of the determination in order to meet CIT jurisdictional requirements. *Id.* In *Jernberg*, as in *Georgetown Steel*, the complaint was initially mailed within 30 days of the summons but was returned due to insufficient postage. The Federal Circuit, however, extended the strict mailing requirements to the pleadings as well as the summons, relying on NEC Corp. v. United States, 622 F. Supp. 1086 (Ct. Int'l Trade 1985), *reh'g denied*, 628 F. Supp. 976 (1986). *Georgetown Steel*, 801 F.2d at 1312-13.

(G.D.R.) was subsidized in the form of a "bounty" or "grant" under section 303 of the Tariff Act of 1930 (1930 Act), thereby permitting the ITA to levy a CVD.[7] After investigating the CVD petitions, the ITA concluded as a matter of law that section 303 was inapplicable to NMEs because subsidies by definition do not exist in NMEs.[8] The CIT reversed the ITA, stating that the ITA made a "basic error in its interpretation and administration of the law."[9]

Although the CIT ruled that the "plain meaning" of section 303 made it applicable to any governmental sudsidy,[10] the Federal Circuit found the statute unclear on its face.[11] Although the statute was originally enacted in 1897 when no NMEs existed, Congress has since reenacted it six times without significant change.[12] The court concluded Congress did not intend to change its "scope or meaning" beyond that of the original "provision . . . first enacted in the last century."[13] Because it lacked congressional direction, the court

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[7] *Id.* at 1313-14. Section 303 provides:

> [W]henever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, *any bounty or grant upon the manufacture or production or export of any article or merchandise* manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, *there shall be levied and paid, in all such cases,* in addition to any duties otherwise imposed, *a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.*

Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687 (codified as amended at 19 U.S.C. § 1303 (1982)) (emphasis added).

[8] *Continental Steel*, 614 F. Supp. at 549. The ITA supported its conclusion on four grounds. First, a sudsidy, by definition, distorts the operation of the free market, which does not exist in nonmarket economies. *Id.* Second, Congress has remained silent on the nonmarket economy issue. *Id.* at 549-50. Third, some academic literature contends that CVDs are inapplicable to NMEs. *Id.* at 550. Fourth, the Secretary of Commerce (ITA) generally has broad discretion to determine the existence or nonexistence of subsidies. *Id.*

The ITA conclusion actually arose out of the carbon steel wire rod cases, not the potash cases. Because the ITA rescinded its investigations into the potash cases after its conclusion in the wire rod cases, the CIT consolidated the cases. *Id.* at 549.

[9] *Id.* at 550. The CIT based its reversal on four grounds. First, the ITA's conclusion was contrary to the plain language and purpose of the statute which the CIT said "shows a meticulous inclusiveness and an unswerving intention to cover all possible variations of the acts sought to be counterbalanced." *Id.* Second, the CIT held the ITA's approach was contradictory to prior judicial decisions on autocratic regimes. *Id.* at 555 (citing Downs v. United States, 187 U.S. 496 (1903), in which the Supreme Court upheld CVDs levied against sugar exports from Czarist Russia). Third, the CIT contended that the ITA's conclusion was inconsistent with previous Commerce Department administration of the law levying duties against products from Nazi Germany. *Continental Steel*, 614 F. Supp. at 555. Fourth, the CIT noted that the ITA's determination contradicted the ITA's own admission that the statute does not permit *per se* exemptions of any political entity. *Id.* at 550.

[10] *Georgetown Steel*, 801 F.2d at 1314. *See also Continental Steel*, 614 F. Supp. at 556.

[11] *Georgetown Steel*, 801 F.2d at 1314.

[12] *Id.*

[13] *Id.*

had to determine whether Congress, at the time of enactment in 1897, would have applied the section to nonmarket economies if they had existed in 1897.[14]

The court concluded that the "economic benefits and incentives"[15] of the U.S.S.R. and G.D.R. did not constitute bounties or grants under the 1897 Act and section 303 of the Tariff Act of 1930.[16] The decision was based on three rationales: (1) the purpose of CVD laws is to prevent unfair competitive advantages, and such advantages do not result from NME imports;[17] (2) the nature of an NME excludes the possibility of a subsidy since it would be subsidizing itself;[18] and (3) since the evolution of NMEs, Congress has explicitly revised antidumping duty (AD)[19] statutes to include NMEs but has repeatedly not included NMEs under CVD statutes.[20]

In reaching its decision, the court, citing the Supreme Court in *Zenith Radio Corp. v. United States*,[21] emphasized that CVDs are levied to offset unfair competitive advantages of subsidized foreign producers.[22] When the foreign producer's government assumes some of the expenses of production and sale in the United States, then U.S. producers are put at a severe disadvantage.[23] Although a foreign producer normally enters the U.S. market only if it can make a profit, a subsidized foreign producer can enter the U.S. market even though it would "otherwise . . . not be in the seller's best economic interest to do so."[24] Congress intended CVDs to protect against "this kind

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[14] *Id.*

[15] The alleged subsidies on the potash imports were: (1) foreign exchange rates on export sales higher than official rates; (2) equalization payments on export prices; and (3) in the Soviet Union only, retention of a share of the hard currency received in the export of the goods. *Id.* at 1315. The court did not determine whether the "economic benefits and incentives" granted the potash imports were in fact subsidies. *Id.* at 1314. The court referred to these as subsidies only "in the loosest sense of the term." *Id.* at 1316. *Georgetown Steel* may be read narrowly, holding only that the economic incentives involved were not subsidies, therefore not countervailable. *See infra* notes 88-90 and accompanying text.

[16] *Georgetown Steel*, 801 F.2d at 1314.

[17] *Id.* at 1315.

[18] *Id.* at 1315-16.

[19] The ITA may levy an AD duty on U.S. imports where there is price discrimination between national markets; to artificially penetrate the U.S. market, the same or similar product is sold at a lower price in the United States than the manufacturing country. Barshefsky & Cunningham, *The Prosecution of Antidumping Actions under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307, 308-18 (1981). *See generally* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (2d ed. 1966); 1 ANTIDUMPING LAW: POLICY AND IMPLEMENTATION (U. Mich. Press ed. 1979); 3 J. PATTISON, *supra* note 1, §§ 1.01-1.05.

[20] *Georgetown Steel*, 801 F.2d at 1316-17.

[21] 437 U.S. 443 (1978).

[22] *Georgetown Steel*, 801 F.2d at 1315. The court cited the following language in *Zenith*: "The countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments." *Id.* (quoting *Zenith*, 437 U.S. at 455-56).

[23] *Georgetown Steel*, 801 F.2d at 1315.

[24] *Id.*

of 'unfair' competition."[25] On the other hand, NMEs are "riddled with distortions."[26] Because prices, transfers, credit, wages, and other economic decisions are centrally planned, "this kind of 'unfair' competition cannot exist."[27]

Second, the court argued that the nature of NMEs excludes subsidization. The court found no evidence that the price would have been greater if the U.S.S.R. or G.D.R. had exported the potash directly rather than through government-controlled exporting entities.[28] Furthermore, the economic incentives did not allow the entities involved to make sales in the United States that they could not have made without the incentives.[29] The court concluded that it was illogical for NMEs to subsidize their manufacturers or exporters because the governments would in effect be subsidizing themselves.[30]

The court's final ground for its holding rested on Congress repeatedly including NMEs under AD statutes while omitting them from CVD statutes.[31] In the Trade Act of 1974,[32] Congress explicitly amended the then current version of the AD law to include NMEs while, at the same time, amending the CVD law without including NMEs.[33] The court recognized that Congress had amended the Trade Agreements Act of 1979 (1979 Act)[34] in a similar manner.[35] Moreover, the 1979 Act codified the Subsidies Code[36] of the General Agreement on Tariffs and Trade (GATT), which permitted signatory

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[25] *Id.*

[26] *Id.* (quoting 49 Fed. Reg. 19,376 (1984) (ITA negative determination in wire rod cases)).

[27] *Id.*

[28] *Id.* at 1316.

[29] *Id.*

[30] *Id.*

[31] *Id.* The court wrote: "Those [AD] statutes indicate that Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of those statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply." *Id.*

[32] Pub. L. No. 93-618, 88 Stat. 1978 (1975). The AD duty provisions, 19 U.S.C. §§ 160-171 (1976), were repealed in 1979. *See infra* notes 34-35 and accompanying text.

[33] *Georgetown Steel*, 801 F.2d at 1316. The court pointed out that Congress also enacted a "surrogate country" system for determining when dumping of NME goods occurs. *Id.* The ITA designates a surrogate market economy with approximately the same GNP as the NME and compares the U.S. import prices of the two countries. *See generally* Horlick & Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807, 828-30 (1984). Congress also established two methods of measuring dumping by NMEs: (1) a constructed value calculation and (2) the actual selling price of some market economy selling the same or similar product. *Georgetown Steel*, 801 F.2d at 1316.

[34] Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C. (1982)).

[35] *Georgetown Steel*, 801 F.2d at 1317.

[36] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter Subsidies Code].

countries to levy either ADs or CVDs against NMEs using "surrogate country"[37] pricing.[38] While the CIT had concluded that congressional enactment of the Subsidies Code was "overwhelming evidence" of legislative intent to enforce both AD and CVD provisions against NMEs,[39] the appeals court rejected this conclusion, stating that the CIT's reasoning was a "non-sequitur," given Congress' failure to extend CVD laws to cover NMEs.[40] The Subsidies Code, according to the court, allowed each signatory to choose its method of handling underpriced NME goods, and Congress clearly had selected ADs.[41]

To reinforce its conclusion, the court noted deference to the administrating agency. Following the Court of Customs and Patent Appeals,[42] the court recognized that the ITA has broad discretion in determining what is and is not a "bounty" or "grant" under section 303.[43]

Before analyzing whether CVDs can be levied against NMEs, a review of the current CVD statutes is necessary.[44] There are two U.S. CVD statutes: section 701 of the 1979 Act,[45] applicable to sig-

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[37] *See supra* note 33.

[38] *Georgetown Steel*, 801 F.2d at 1317.

[39] *Continental Steel*, 614 F. Supp. at 556-57. The CIT wrote:

> Article 15 of the [Subsidies] Code clearly gives a country the choice of using subsidy [CVD] law *or* antidumping law for imports from a country with a state-controlled economy. Moreover, Congress was informed that nonmarket economies had participated in the preparation of the Code and that it had been signed, subject to subsequent ratification, by two such countries [Hungary and Bulgaria, *see* Analysis of Nontariff Agreements, U.S.I.T.C. Inv. No. 332-101 (1979)].
>
> In the opinion of the Court this constitutes over-whelming evidence that the 1979 Act shows a definite understanding by Congress that the countervailing duty law covers countries with nonmarket economies.

Id. (footnotes omitted).

[40] *Georgetown Steel*, 801 F.2d at 1317.

[41] *Id.* at 1317-18.

[42] United States v. Zenith Radio Corp., 562 F.2d 1209 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978).

[43] *Georgetown Steel*, 801 F.2d at 1318. "We cannot say that the Administration's [ITA's] conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion." *Id.*

[44] For a more extensive review of U.S. CVD laws, see 3 J. PATTISON, *supra* note 1, §§ 1.04, 6.01-6.02[21]; deKieffer, *When, Why, and How to Bring a Countervailing Duty Proceeding: A Complainant's Perspective*, 6 N.C.J. INT'L L. & COM. REG. 363 (1981); Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW. 761, 769-772 (1985).

[45] Trade Agreements Act of 1979, Pub. L. No. 96-39, § 701, 93 Stat. 144, 151 (codified at 19 U.S.C. § 1671(a) (1982)). Section 701 provides:

> GENERAL RULE. —If—
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> (1) the administering authority determines that —
>
> (A) a country under the Agreement [*see infra* note 36], or
>
> (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,
>
> is providing, directly or indirectly, a subsidy with respect to the manufacture,

natories of certain GATT agreements,[46] and section 303 of the 1930 Act,[47] applicable to non-signatories. The latter provision was the subject of *Georgetown Steel*. The major distinction between the two statutes is that the International Trade Commission (ITC)[48] must, under section 701, make an affirmative determination that a U.S. industry is materially injured, threatened with material injury, or retarded from establishment before the ITA may levy a CVD against a GATT signatory.[49] No such requirement exists under section 303. CVDs can be levied against non-signatories even when no U.S. industry is injured[50] unless the goods come duty-free from a signatory country[51] or an international agreement requires an injury determination.[52] Most NMEs are not signatories; only Hungary and Bulgaria have signed the applicable agreements.[53]

CVDs are levied to offset any unfair trade advantage a foreign exporter obtains over U.S. manufacturers from subsidies paid by foreign governments.[54] Both the ITA and various courts have found actionable subsidies in direct government equity participation,[55]

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production, or exportation of a class or kind of merchandise imported into the United States, and

(2) the Commission determines that —

(A) an industry in the United States —

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

Id.

[46] *Id.* § 1671(b). The applicable agreements are the Subsidies Code, *supra* note 36, and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 492, T.I.A.S. No. 9650 [hereinafter Antidumping Article].

[47] *See supra* note 7 and accompanying text.

[48] The ITC, an independent presidential commission approved by the Senate (*see* 19 U.S.C. § 1330 (1982)), is responsible for determining domestic injury. 19 U.S.C. § 1332 (1982). The ITA, an office of the Department of Commerce, is responsible for determining the existence of a subsidy, measuring the subsidy, and levying a countervailing duty. *See* 3 J. PATTISON, *supra* note 1, § 1.04.

[49] 19 U.S.C. § 1671(a)(2) (1982). *See also supra* note 44. Although the Trade Agreements Act § 701(2) requires the ITC to make an affirmative determination of domestic injury, the Tariff Act of 1930 § 303 has no such language. *See supra* note 7. A "material injury" is a "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982).

[50] 19 U.S.C. § 1303 (1982). *See also supra* note 7 and accompanying text.

[51] 19 U.S.C. § 1303(a)(2) (1982).

[52] *Id.*

[53] *See* Analysis of Nontariff Agreements, U.S.I.T.C. Inv. No. 332-101 (1979).

[54] *Zenith*, 437 U.S. at 445.

[55] Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Belgium, 47 Fed. Reg. 39,304 (1982) (subsidy found in company debt converted to government equity).

preferential interest rate loans,[56] direct grants,[57] raw material cost subsidization,[58] tax benefits,[59] export rebates,[60] reduced state-provided transportation rates,[61] and exchange rate benefits.[62] This list illustrates that countervailable subsidies may occur at any time or point in the manufacture, production, or export of goods.

Before *Georgetown Steel*, the leviability of CVDs against NMEs was strictly a matter of academic dispute.[63] There are two opposing schools of thought.[64] The first view is that no subsidy can exist because NMEs are driven through government intervention and, therefore, no "commercial benchmarks" are available to measure government assistance.[65] The second school views the definition of subsidy more broadly, arguing that a subsidy can exist whenever a government shows preferential treatment to a particular good above the normal or average level of treatment by the government regardless of the type of economy.[66]

The first petition seeking CVDs against NME goods was *Initiation of Countervailing Duty Investigations; Textiles, Apparel, and Related Products from the People's Republic of China*.[67] The case was terminated

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[56] Unprocessed Float Glass from Mexico; Countervailing Duty Determination, 49 Fed. Reg. 23,097 (1984).

[57] Final Affirmative Countervailing Duty Determination; Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39,345 (1982) (subsidy found in government grant to purchase equipment).

[58] *Id.* at 39,348 (government assistance to coke producers held countervailable subsidy on German steel imports).

[59] Countervailing Duties; Final Affirmative Determination, Steel Pipe and Tube Products from South Africa, 48 Fed. Reg. 40,928 (1983) (tax credits and deductions linked to exports held subsidy).

[60] *Id.*

[61] Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders; Certain Steel Products from South Africa, 47 Fed. Reg. 39,379 (1982) (subsidy found in preferential rail rates for exports).

[62] Energetic Worsted Corp. v. United States, 224 F. Supp. 606 (Cust. Ct. 1963) (subsidy found in Uruguayan exchange rates benefitting wool products exporters).

[63] *See, e.g.*, Horlick & Shuman, *supra* note 33, at 828-29.

[64] *Id.* at 829.

[65] *Id.*

[66] *Id.* The CIT apparently adopted the second school of thought holding a subsidy may be found in "beneficial deviations" from "patterns of regularity." *Continental Steel*, 614 F. Supp. at 554.

[67] 48 Fed. Reg. 46,600 (1983). The arguments by the domestic manufactures favoring the levy of CVDs were: 1) the plain language of the Tariff Act of 1930 § 303 uses the term "any country," making it applicable to NMEs; 2) the legislative history states § 303 is to prevent unfair competition of foreign governments, without regard to market or nonmarket economy; and 3) international agreements to which the United States is a party reflect an equal application of CVDs to market and nonmarket economies. Recent Development, *Countervailing Duties and Non-Market Economies: The Case of the Peoples Republic of China*, 10 SYRACUSE J. INT'L L. & COM. 405, 408-10 (1983). The arguments offered by the importers opposing CVDs were: 1) the plain language of § 303 applies to free market economies only because "bount[ies] or grant[s]" are not found in NMEs; 2) while there is no legislative history requiring CVDs be applied to NME goods, there is history for applying ADs to NME goods; and, 3) international agreements to which the United States is a party do not require application of CVDs against NMEs. *Id.* at 410-12.

before the ITA delivered a preliminary opinion.[68] Next arose the steel wire rod cases (the subject of the procedural issue in *Georgetown Steel*[69]), in which the ITA held CVDs inapplicable to NMEs because subsidies were market distortions that could not occur in NMEs.[70] After its determination in the steel wire rod cases, the ITA rescinded its on-going investigations in the potash cases (the subject of the substantive issue in *Georgetown Steel*[71] and this Note).[72] U.S. manufacturers appealed the administrative decisions, and the CIT consolidated both cases, holding that countervailable subsidies can be found in NMEs.[73]

Due to the lack of prior case law on levying CVDs against NME goods, *Georgetown Steel* is especially significant. Because all ITA determinations are appealed to the CIT,[74] and CIT decisions are appealed to the Federal Circuit,[75] *Georgetown Steel* settles that countervailable subsidies may not be found on NME goods.[76] Furthermore, *Georgetown Steel* increases the importance of ADs because CVDs are no longer available as countertrade measures against NMEs.

Finally, *Georgetown Steel* relieves the ITA of the potentially impossible task of measuring subsidies in an NME. Although ADs are based on price discrimination,[77] CVDs are based on subsidies that, in a centralized economy, are potentially immeasureable. To monitor the normal allocation of resources flowing to every NME export in order to determine when an alleged subsidy occurs, as the CIT suggested,[78] would significantly multiply ITA administrative work.

As trade barriers to countries behind the iron and bamboo curtains are lifted, CVDs on NME goods must also be removed, if the goal is consistency. All production in NMEs involves government intervention. To hold that this intervention amounts to countervail-

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[68] Textiles, Apparel, and Related Products from The People's Republic of China; Termination of Countervailing Duty Investigations, 48 Fed. Reg. 55,492 (1983).

[69] *See supra* notes 6, 8 and accompanying text.

[70] Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (1984); Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (1984).

[71] *Georgetown Steel*, 801 F.2d at 1313-18.

[72] Potash from the U.S.S.R. and the G.D.R., 49 Fed. Reg. 23,428 (1984).

[73] *Continental Steel*, 614 F. Supp. at 549.

[74] 19 U.S.C.A. § 1516a(a) (West Supp. 1986).

[75] 28 U.S.C. § 2645(c) (1982).

[76] Congress, however, is considering several proposals addressing the nonmarket economy import problem. *See* Hardt & Boone, *Trade Control Policy*, CONG. RES. SERV. REV. Feb. 1987, at 29, 30. One proposal actually eliminates the applicability of either ADs or CVDs against NMEs, instead establishing an artificial pricing mechanism where NMEs which supply pricing information to the U.S. government could be treated as if free market economies. 131 CONG. REC. S11378 (daily ed. Nov. 20, 1985).

[77] *See supra* note 19 and accompanying text.

[78] *See supra* note 66 and accompanying text.

able subsidies could all but end trade with NMEs since all NME products would be subject to duties.

ADs are the proper unfair trade duty against NME products. If an NME product, after adjustments for exchange rates, transportation fees, and similar expenses,[79] costs less in the U.S. market than the home or third country market, then an AD may be leviable. If the NME product does not cost more after proper adjustments, then an AD is not available. Thus, ADs are a more realistic remedy because, unlike CVDs, they do not look to government intervention but consider sales price differential.[80]

The lifting of trade barriers has also created a free trade versus fair trade controversy. While free trade proponents want little or no state-imposed tariffs or duties to facilitate international trade, fair trade proponents want tariffs and restrictions on all states which unfairly advantage their producers and exporters. In NMEs with low labor costs, it is likely that goods can be produced less expensively than in the United States. Fair traders may argue that repressive labor conditions in many NMEs constitute a form of subsidy because wage earners must work for less than a natural market rate. *Georgetown Steel* takes a middle ground in the free versus fair trade controversy: The case limits random CVD levying against NMEs but reaffirms congressional support for AD duties when unfair dumping occurs.[81]

Returning to the hypothetical posed at the beginning of this Note, clearly the ITA could levy a CVD against subsidized goods from the market economy of the Southern Republic of the Pacific. Any subsidy could be investigated, ascertained, measured, and offset by ITA officials.[82] Even most free traders would not oppose the levying of such a CVD. Since the Southern Republic acted first to reduce market prices artificially, the CVD only helps restore the price to its natural market level, albeit through an artificial mechanism.

Under *Georgetown Steel*, CVDs are not leviable against the nonmarket economy of the Northern People's Republic of the Pacific, despite state-determined prices which are significantly lower than U.S. market prices. Without *Georgetown Steel*, the ITA would be

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[79] *See* 19 U.S.C. § 1677b(b) (1982) (proper methodology for obtaining and constructing prices to measure dumping).

[80] Although AD duties levied against NME goods appear to be more reasonable than CVDs, the application of ADs to NME products may also be called into question. For an analysis of the problems inherent in AD duties, see Corr, *The NME Import Regulation Debacle: Two Proposals for a New Regulatory Approach*, 12 N.C.J. INT'L L. & COM. REG. 59 (1987).

[81] *See supra* notes 31-41 and accompanying text.

[82] If, of course, the Southern Republic is a signatory to the applicable agreements (Subsidies Code, *supra* note 36; Antidumping Article, *supra* note 46), only § 701 of the Trade Agreements Act of 1979 is available, and the ITC would have to make a "material injury" determination before the ITA could levy the CVD. *See supra* notes 45-49 and accompanying text.

charged with ascertaining some subsidy arising out of the deviation in normal state-allocations[83] which likely fluctuate each year as a result of state planners' adjustments to annual allocations. Because of the subjectiveness of this determination, not only is the margin of error great but the potential for abuse is significant, especially when political pressure is raining down from the White House or Congress. Instead, *Georgetown Steel* implicitly directs the ITA to apply ADs to NMEs using mechanisms[84] that, although not perfect,[85] are less subject to abuse. If there is evidence that the price in the United States is less, after proper adjustments,[86] than the price in the home or third country, then the ITA may levy an AD duty.[87]

Georgetown Steel, on the other hand, may be read narrowly. The Federal Circuit did not clearly hold that CVDs are never applicable to NME goods. Instead, the decision may be read as rendering CVDs inapplicable only to the particular subsidies involved in the case.[88] Calling them subsidies "in the loosest sense of the term,"[89] the court simply did not believe that these were the type of subsidies intended as "bount[ies]" or "grant[s]" under section 303.[90] Thus, a practitioner petitioning for CVDs against NME goods may, in good faith, distinguish *Georgetown Steel* from other alleged subsidies on NME goods.

Although the issue of levying CVDs against NMEs was a non-issue just a few years ago, it will undoubtably grow in importance with the liberalization of formerly closed NMEs. Although *Georgetown Steel* does not resolve all the problems associated with the application of CVDs to NMEs, it is a first step. What is needed is a clearer understanding of how to apply U.S. trade laws to NMEs.[91]

Consequently, Congress needs to clarify the application of U.S. trade laws to NMEs by enacting pending legislation[92] or by drafting new legislation. Congress' amendment of AD laws to include NMEs is inadequate. Because the economic structure of an NME is anti-

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[83] *See supra* note 66 and accompanying text.

[84] *See supra* notes 19, 33 and accompanying text.

[85] *See supra* note 80.

[86] *See supra* note 79 and accompanying text.

[87] *See supra* note 19 and accompanying text.

[88] *See supra* note 15 and accompanying text.

[89] *Georgetown Steel*, 801 F.2d at 1316. *See also supra* note 15 and accompanying text.

[90] *Id.* Evidence of this narrow reading is found in the following language:

> [W]e conclude that the *economic incentives and benefits* that the Soviet Union and German Democratic Republic have provided for the export of potash from those countries to the United States do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended.

Id. at 1314 (emphasis added). By emphasizing this narrow language, a practitioner can argue the remainder of the case is dicta.

[91] NMEs are a relatively new and unique economic phenomenon. As one author noted, the earliest versions of CVD laws were enacted before the Bolshevik Revolution. Sandler, *supra* note 44, at 771.

[92] *See supra* note 76.

thetical to U.S. economic theory, Congress should develop a comprehensive trade bill dealing with NMEs. Only in this manner can Congress balance the interests of U.S. consumers who enjoy the lower prices of NME goods and U.S. manufacturers who are injured by the competition created, ironically, by non-competitive economies.

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